Supreme Court, U.S.
FILED
93 2068 JUN 22 1994
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

BRETT C. KIMBERLIN,

Petitioner,

v.

J. MICHAEL QUINLAN and
LOYE W. MILLER, JR.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether plaintiffs in *Bivens* cases in which unlawful motive is an element of the alleged offense must satisfy a "heightened pleading standard" to survive a motion to dismiss or for summary judgment based on an assertion of qualified immunity? The court below imposed a "heightened pleading standard," in conflict with decisions of the First and Seventh Circuits and contrary to this Court's decision in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160 (1993).

2. Whether plaintiffs in *Bivens* cases must produce, prior to discovery, "direct," as opposed to persuasive circumstantial evidence of unlawful motive? The court below imposed a direct evidence requirement, in conflict with decisions of the Sixth, Seventh and Ninth Circuits.

PARTIES TO THE PROCEEDINGS

The following parties were defendants in the district court: J. Michael Quinlan, Loye W. Miller, Jr. and the United States of America. The sole plaintiff was petitioner, Brett C. Kimberlin. Only respondents Quinlan and Miller were appellants in the court of appeals. Claims against the United States remain pending in the district court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Brett C. Kimberlin petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a - 43a) is reported at 6 F.3d 789. The concurring and dissenting opinions on petitioner's suggestion for rehearing *en banc* are reported at 17 F.3d 1525. App., *infra*, 65a- 76a. The opinion of the district court (App., *infra*, 44a - 64a) is reported at 774 F. Supp. 1.

JURISDICTION

The judgment of the court of appeals was entered on October 8, 1993. A timely petition for rehearing was denied

on April 1, 1994. App., *infra*, 65a-76a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND FEDERAL RULES INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Rules 8(a), 9(b) and 56 of the Federal Rules of Civil Procedure are set forth at App., *infra*, 77a-79a.

INTRODUCTION AND STATEMENT OF THE CASE

This case arises from admittedly unprecedented actions by federal officials that silenced and punished a citizen who claimed to have potentially damaging information about a candidate for high public office. That deprivation of petitioner's First Amendment rights provides the context for this Court to address the important and unsettled question of how to balance two indispensable constitutional interests: the ability of victims of constitutional violations to seek vindication in court and to deter future violations, and the ability of government officials to perform their functions without undue concern about potential litigation. In conflict with other courts of appeals, the District of Columbia Circuit has imposed a "heightened pleading standard" in Section 1983 and *Bivens* cases where unlawful motive is an element.[1]

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[1] The same standards of qualified immunity apply to *Bivens* and Section 1983 cases. *See Carlson v. Green*, 446 U.S. 14, 22 (1980) ("[T]he 'constitutional design' would be stood on its head if federal officials did not face at least the same liability as state officials guilty of the same constitutional transgression" (quoting *Butz v. Economou*, 438 U.S. 478, 504 (1978)).

Although the district court held that petitioner satisfactorily showed "tangible," "concrete" and "persuasive" evidence of unlawful intent (App., *infra*, 53a), the court of appeals held that, prior to any discovery, a plaintiff must submit "direct" evidence of intent. *Id.* at 12a-13a. In reversing, the court of appeals determined that anything short of a voluntary confession of wrongdoing by the defendant results in dismissal of an otherwise meritorious *Bivens* action prior to discovery. Because state of mind is generally provable only through circumstantial evidence, the ruling below effectively prohibits an entire class of *Bivens* and Section 1983 claims.

So nettlesome are these issues that six members of the District of Columbia Circuit expressly commented on the importance of and need for Supreme Court review in this case. App., *infra*, 66a, 68a, 76a. That extraordinary endorsement is well-founded: The decision below squarely conflicts with the holdings of other courts of appeals on two important and recurring issues concerning the scope of qualified immunity; it is contrary to the underpinnings of this Court's holding prohibiting judge-made "heightened pleading standards" in a related context; it imposes a standard with which five Justices of the Supreme Court have disagreed; and it conflicts with the well-established principle that circumstantial evidence is not intrinsically different from direct evidence. In short, this case is a nonpareil candidate for review.

1. Background. This case involves governmental infringement of the most basic First Amendment rights of "[a] citizen of the United States [who] suggested to the media that he had damaging information about the candidate for the second-highest executive position in our democracy." App., *infra*, 43a. Days before the 1988 presidential election, high-ranking federal officials, under pressure from political campaign workers, locked the petitioner into "'administrative detention,' where he was effectively precluded from sharing his story with an understandably curious media." *Id.*

On November 4, 1988, the Director of the United States Bureau of Prisons, respondent J. Michael Quinlan, learned

that a prison warden in Oklahoma had scheduled, pursuant to applicable regulations, a "group interview" for that evening to accommodate requests from news organizations to interview petitioner Brett Kimberlin, a prison inmate. App., *infra*, 45a. The reporters sought to interview petitioner about allegations that in the early 1970's he had sold marijuana to the 1988 Republican candidate for vice president. *Id.* at 44a. Upon learning of this development, a senior official of the Bush-Quayle Campaign complained to respondent Loye Miller, a senior Justice Department official, who, in turn, repeatedly contacted Director Quinlan's office. *Id.* at 27a, 55a. Quinlan thereupon personally ordered the group interview canceled and petitioner locked into "administrative detention." *Id.* at 54a.

Prison officials released petitioner from confinement over the weekend before the November 8 election, only to learn, from monitoring his telephone calls, that he planned to relate his story to a group of reporters on Monday, the day before the election. App., *infra*, at 55a. Again, petitioner was locked into detention before he could speak to the reporters, and he was held there until a week after the election. *Id.*

Petitioner filed this *Bivens* action alleging intentional violations of his First Amendment rights against former senior Justice Department officials Quinlan and Miller.[2] Respondents moved to dismiss the complaint or, alternatively, for summary judgment based on an assertion of qualified immunity. In accordance with the procedure for motions involving claims of qualified immunity, the district court stayed all discovery relating exclusively to the *Bivens*

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2 *See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The complaint also asserts claims under the Federal Tort Claims Act, 28 U.S.C. § 2671, Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2511, and the Fifth Amendment. The district court dismissed the Fifth Amendment claim as duplicative of the First Amendment claim, and a portion of the tort claim on grounds of venue. These other claims are not subjects of this petition.

claim and prohibited the taking of respondents' depositions.[3]

Respondents contended that they were entitled to immunity because petitioner allegedly failed to satisfy the "heightened pleading standard" the District of Columbia Circuit created in *Siegert v. Gilley*, 895 F.2d 797, 802 (D.C. Cir. 1990), *aff'd on other grounds*, 111 S. Ct. 1789 (1991), which requires a plaintiff to submit, prior to discovery, "direct as opposed to merely circumstantial evidence of the intent."

In opposition, petitioner submitted numerous internal government documents, affidavits and other evidence that established respondents' unlawful intent in at least four ways: (1) by showing that respondents' proffered explanations for the confinements were false and contradicted by objective evidence; (2) by showing that respondents' explanations for their actions were repeatedly revised; (3) by showing that respondents were improperly influenced by at least one senior official of the 1988 Bush-Quayle campaign; and (4) by showing that, just before the detentions, respondents barred petitioner from meeting with reporters because of the content of his speech.

For example, petitioner's submissions showed that respondent Quinlan offered a pretextual explanation for the confinement to his superiors and to members of Congress, *viz.*, that a reporter expressed fear for petitioner's safety. App., *infra*, 54a. Yet, the reporter affirmed in a sworn affidavit that she "had never said any such thing." *Id.*

Additional evidence showed that respondent's explanation was pretextual:

> 1. Never before had a Director of the Bureau of Prisons ordered an individual inmate into detention for any reason, let alone to protect the inmate's "safety," a determination historically left to local officials. App., *infra*, 54a.

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3 *See generally Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("Until [the] threshold immunity question is resolved, discovery should not be allowed.")

2. Respondent Quinlan's order followed on the heels of heated telephone calls to respondent Miller from a senior campaign official, who exclaimed that he was "bowled over" and "amazed" that petitioner would be allowed to relay his story to the media. App., *infra*, 27a. Respondent Miller, in turn, was in constant communication with the Director's office. *Id.* at 24a-27a, 55a.

3. Once confined, petitioner was subjected to a standing order prohibiting his use of the telephone, which not only was inconsistent with a stated effort to protect his safety, but also violated Bureau regulations. App., *infra*, 24a.

4. The supposed effort to protect petitioner's "safety" was implemented by officials who wrestled petitioner from his room, placed him in handcuffs, "wheelbarrow marched" him to detention in a painful, hunched-over position, denied him adequate clothing, and conducted a strip search, all of which, as the district court found, were "inconsistent with administrative segregation as a protection for his own safety." App., *infra*, 23a, 55a.

5. The Bureau subsequently conceded that there was no threat to petitioner's safety. App., *infra*, 6a.

Petitioner also submitted evidence showing that respondent Quinlan canceled the scheduled group interview on November 4 because of the content of petitioner's speech.[4] App., *infra*, 27a-28a, 54a-55a.

With respect to the confinement on the day before the election, pre-discovery submissions established that

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[4] For example, the explanation Quinlan offered for cancelling the group interview -- that Bureau "policy" prohibits such interviews -- is "entirely suspect." App., *infra*, 27a. Bureau regulations authorize wardens to regulate the number of press personnel entering the institution and it was the local prison officials who initially suggested the procedure. App., *infra*, 28a. Moreover, reporters "were told that the press conference was cancelled due to `unfor[e]seen circumstances,'" not because it allegedly violated Bureau regulations. *Id.*

respondent Quinlan gave this order to prohibit petitioner from speaking with reporters. Contrary to pretextual justifications offered at the time, the Bureau of Prisons has acknowledged that petitioner was confined to keep him from speaking with the gathered reporters on the morning before the election:

> On Monday, November 7, 1988, upon review of intelligence information, it was determined that Mr. Kimberlin was attempting to use the telephone to set up a press conference in Washington, D.C. that morning. *As a result*, Mr. Kimberlin was again placed in administrative detention.

App., *infra*, 26a (emphasis added), quoting Bureau of Prisons Administrative Decision. Respondent Miller made the same admission. *Id.* at 26a, 56a. As the district court found, respondent Quinlan had been closely monitoring communications with the press and this "detention, like the previous one, was also ordered personally by Director Quinlan."[5] *Id.* at 55a.

2. The district court decision. In denying respondents' motion for qualified immunity, the district court held that petitioner satisfied the "heightened pleading" standard by supporting his allegations of unlawful intent with facts and evidence that were "nonconclusory," "tangible," and "concrete." App., *infra*, 53a.

The district court analyzed the record in light of the "heightened pleading standard" articulated by the District of Columbia Circuit in *Siegert v. Gilley*. In *Siegert*, the court of appeals ruled that in cases in which motive is an element of the alleged offense, *Bivens* and Section 1983 plaintiffs must present "direct evidence" of intent, and that circumstantial or inferential evidence is inadequate to survive a defense of qualified immunity. 895 F.2d at 798.

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5 Substantial additional evidence of respondents' unlawful motive is summarized in the district court's opinion and in the majority and dissenting opinions of the court of appeals. App., *infra*, 3a-7a, 21a-29a, 54a-56a.

The district court reasoned that *Siegert* did not depart from this Court's precedent establishing that direct evidence is no better, and is often less reliable, than circumstantial evidence. App., *infra*, 52a. The court also noted the inherent impracticality of producing "direct evidence" of intent in any circumstances, let alone prior to discovery, and held: "it is unlikely that the Court of Appeals meant in *Siegert* to exclude from consideration any and all circumstantial evidence as that term is understood in the law of evidence irrespective of its specificity and concreteness." *Id.* at 52a n.9. In this regard, the district court observed that its analysis was consistent with the view expressed in the Solicitor General's brief to this Court in *Siegert*. *Id.*

On the extensive evidentiary showing in this case, the district court found that petitioner's pre-discovery submissions "tend to show, circumstantially yet in tangible and persuasive fashion, that the defendants had the intent or motive requisite for a *Bivens* action."[6] *Id.* at 53a.

3. The court of appeals decision. On respondents' interlocutory appeal,[7] a divided panel of the United States Court of Appeals for the District of Columbia Circuit reversed and dismissed petitioner's *Bivens* claim. The panel produced three separate opinions. The majority opinion written by Judge Henderson held that the "heightened pleading standard" enunciated in *Siegert* requires *Bivens* and Section 1983 plaintiffs to produce, prior to discovery, "*direct* evidence" of unconstitutional motive. App., *infra*, 12a - 13a. (emphasis in original). The majority concluded that this action must be dismissed at the outset because petitioner's pre-discovery submissions constituted "mere" circumstantial or inferential evidence of respondents' unlawful efforts to silence him. *Id.*

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6 Respondents also argued that petitioner did not allege violations of law that were "clearly established" at the time of the injury. App., *infra*, 47a - 49a. The district court rejected this contention because it was well established at the time of the injury that prison inmates may not be punished or censored because of the content of their speech. *Id.* at 47a-48a. On appeal, respondents abandoned their contention that the rights claimed to have been violated were not clearly established.

7 *See Mitchell v. Forsyth*, 472 U.S. 511 (1985).

In a separate concurring opinion, Judge Williams expressly criticized the "direct evidence" pleading rule imposed by circuit precedent. Recognizing that "the requirement would be fatal except in the rare case of the defendant's confession," Judge Williams observed that it "appears completely arbitrary and unrelated to the strength of the plaintiff's case." App., *infra*, 18a. Judge Williams also found it "hardly surprising that the only circuits to consider [the District of Columbia Circuit's] direct evidence rule have rejected it." *Id.*

In dissent, Judge Edwards stressed that the circuit's heightened pleading standard will "prevent a plaintiff from overcoming the qualified immunity defense except in the most extraordinary circumstances." App., *infra*, 41a. He also noted this Court's holding that "heightened pleading" standards in civil rights actions alleging municipal liability impermissibly conflict with the Federal Rules of Civil Procedure. *Id.* at 20a. *See Leatherman v. Tarrant County, Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160 (1993). While acknowledging that *Leatherman* expressly reserved the question whether a heightened pleading standard is permissible in cases alleging individual liability, Judge Edwards reasoned that the basis for the holding "casts doubt on the validity of *any* judge-made 'heightened pleading' standard imposed in *any* context." App., *infra*, 20a (emphasis in original).

Even if a "heightened pleading" standard were permissible, Judge Edwards continued, the requirement of "direct evidence" of intent has "no foundation in reason or in the case law." App., *infra*, 21a. In this case, Judge Edwards found that petitioner had presented "powerful circumstantial evidence" that "overwhelmingly supports an inference that the defendants acted with unconstitutional motive." *Id.* at 28a, 39a. He concluded (*id.* at 43a):

> While we might expect such official action not to raise eyebrows in a country with fewer guarantees of civil liberty, such action is unfathomable in this country under our constitutional system of government. I simply cannot imagine that the judiciary of

> the United States will shut the doors of the courthouse and refuse to allow Kimberlin's suit to proceed for the specious reason that his complaint is based on circumstantial evidence.

4. Opinions accompanying denial of rehearing *en banc*. The petition for rehearing and suggestion for rehearing *en banc* was denied, although more active members of the court favored rehearing than opposed it.[8] And *six* judges either wrote or joined in opinions expressing the clear need for this Court to review the decision below.

Judge Silberman, concurring in the denial of *en banc* review, acknowledged that "[t]hose who criticize this circuit's direct versus circumstantial evidence distinction . . . have a logical point." App., *infra*, 68a (citation omitted). Nevertheless, Judge Silberman opposed rehearing *en banc* on the ground that "the Supreme Court is better positioned than we to resolve the broader problem." *Id.*

Judge Williams, joined by Judges Buckley and Silberman in concurrence, similarly acknowledged that "[t]he imperfections of [this circuit's] 'direct evidence' rule are plain to see" (App., *infra*, 66a), but concluded that "it seems to me on balance preferable to continue with the imperfections of *Siegert* until the Supreme Court resolves the issue." *Id.* at 67a - 68a.

Writing in dissent, Judge Edwards, joined by Chief Judge Mikva and Judge Wald, described the circuit's pleading standard as "Kafkaesque." App., *infra*, 70a. He explained that the panel decision conflicts with this Court's rationale in *Leatherman*, squarely conflicts with the three

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[8] Five of the court's ten active judges voted in favor of rehearing the case *en banc* and four voted against. App., *infra*, 70a. Judge Rogers, who joined the court on March 11, 1994, did not participate in the decision. *Id.* at 66a. Under the Federal Rules of Appellate Procedure and D.C. Circuit internal procedures, a suggestion for rehearing *en banc* is denied unless favored by a majority of judges in active service at the time of the vote. Fed. R. App. P. 35(a); United States Court of Appeals for the District of Columbia Circuit Handbook of Practice and Internal Procedures ¶ XIII B.2. (1994).

other circuits that have considered and rejected the "direct evidence" rule, and is supported by "neither logic nor law." *Id.* at 73a. Judge Edwards cautioned that the panel's decision will "deny[] relief to a whole class of claims, apparently only on the basis of the plurality's conviction that the Supreme Court has gone too far in permitting them." *Id.* at 75a. He concluded with the "hope that the Supreme Court will see fit to reverse the error that this decision introduces into the law of this circuit." *Id.* at 76a.

REASONS FOR GRANTING THE PETITION

REVIEW IS NECESSARY TO RESOLVE A CONFLICT AMONG THE CIRCUITS, AND BETWEEN THE FEDERAL COURTS AND STATE COURTS OF LAST RESORT, CONCERNING THE PROPER STANDARD FOR ASSESSING QUALIFIED IMMUNITY

This Court has often noted the importance of reviewing cases that present unresolved questions of qualified immunity.[9] The decision below squarely conflicts with the holdings of three other courts of appeals, which have considered and rejected the District of Columbia Circuit's "direct evidence" pleading standard (and five Justices of this Court have expressed similar views). It also conflicts with the logic of this Court's decision, and with the holdings of two courts of appeals, that "heightened pleading" standards violate the Federal Rules of Civil Procedure.

If the decision below is permitted to stand, any *Bivens* or Section 1983 case that turns on unlawful motive will be dismissed unless the plaintiff somehow unearths a confession of wrongdoing without the benefit of discovery. Citizens whose civil and constitutional rights are thus violated stand in jeopardy of losing vital protection afforded

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[9] *See, e.g., Butz v. Economou*, 438 U.S. 478, 480-481 (1978) ("Because of the importance of immunity doctrine to both the vindication of constitutional guarantees and the effective functioning of government, we granted certiorari"). *See also Siegert*, 111 S. Ct. at 1793 ("We granted certiorari . . . in order to clarify the analytical structure under which a claim of qualified immunity should be addressed"); *Mitchell v. Forsyth*, 472 U.S. at 519; *Harlow v. Fitzgerald*, 457 U.S. at 801.

by *Bivens* and Section 1983 actions. Equally important, assertions of qualified immunity by public officials in different parts of the country will be subject to different standards.

The extraordinary endorsement of certiorari by six members of the District of Columbia Circuit attests to the need for this Court's review. The petition should be granted in order to restore uniformity and certainty to the important balance between the constitutional rights of individuals and the effective functioning of government.

A. The Ruling Below Conflicts With Three Other Courts Of Appeals On Whether *Bivens* Plaintiffs Are Required To Produce "Direct" Evidence Of Intent At The Pre-Discovery Stage

In conflict with the decision below, three federal courts of appeals have considered and rejected the District of Columbia Circuit's rule requiring *Bivens* and Section 1983 plaintiffs to present "direct evidence" of intent to survive dismissal on grounds of qualified immunity. The Sixth, Seventh and Ninth Circuits have expressly held that circumstantial evidence is sufficient.[10]

The Seventh Circuit has explicitly rejected the direct evidence requirement the District of Columbia Circuit created in *Siegert*: "Although the court of appeals' opinion in *Siegert* insisted . . . that the plaintiff produce 'direct' evidence of the defendant's improper intent, we agree with Justice Kennedy ['s concurring opinion in *Siegert*] that there is no principled difference between direct and circumstantial evidence." *Elliott v. Thomas*, 937 F.2d 338, 345 (7th Cir. 1991) (citation omitted), *cert. denied*, 112 S. Ct. 1242 (1992). The unanimous panel observed: "Requiring 'direct' evidence of intent would be fatal in all but the rare case in which the defendant confessed." *Id.*

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[10] Contrary to the District of Columbia Circuit's rule requiring *Bivens* plaintiffs to submit "direct evidence," the Federal Rules of Civil Procedure require that all facts must be viewed in the light most favorable to the non-moving party. *See Leatherman*, 113 S. Ct. at 1161; *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

The Ninth Circuit also has flatly stated that "[w]e disagree . . . with the District of Columbia Circuit that a plaintiff may only satisfy the heightened pleading standard with direct, as opposed to circumstantial, evidence." *Branch v. Tunnell*, 937 F.2d 1382, 1386 (1991), *appeal after remand*, 14 F.3d 449 (9th Cir. 1994), *cert. denied* (June 20, 1994) No. 93-1327.[11] Finally, the Sixth Circuit rejected a "direct evidence" rule in *Crutcher v. Kentucky*, 883 F.2d 502, 504 (6th Cir. 1989). The court held that plaintiff may rely on proof "that would be strong enough to allow a jury to return a verdict for her under appropriate instructions," and stated: "it is clear that the law allows victims of race discrimination, as in other cases, to prove their cases by inferential and circumstantial proof."

The District of Columbia Circuit's stated resolve to apply its admittedly flawed "direct evidence" rule until this Court adjudicates the issue shows that this Court's intervention is needed to provide uniformity among the courts of appeals on an important and recurring issue.

B. The Ruling Below Conflicts With This Court's Holdings That Circumstantial Evidence Is Not Intrinsically Different From Direct Evidence

By erecting a pleading standard that requires *Bivens* plaintiffs to submit "direct evidence" of intent, the decision below also conflicts with this Court's holdings that "[c]ircumstantial evidence . . . is intrinsically no different from testimonial evidence." *Holland v. United States*, 348 U.S. 121, 140 (1954). In some instances, circumstantial evidence

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11 In contrast to the present case, the Solicitor General noted in his brief in opposition in *Branch v. Tunnell* that the complaint "failed to state a claim even in the absence of a heightened pleading standard." *Brief for the Respondent in Opposition*, No. 93-1327, at 11. Moreover, the petitioner in *Branch* "failed to identify any respect in which a lower pleading standard would have affected the outcome of this case." *Id.* at 9. In the present case, however, the Justice Department acknowledged before the court of appeals: "If plaintiff's standard of pleading and proof is applied to this case, we agree that summary judgment was properly denied." *Reply Brief for Appellants* (D.C. Cir., No. 91-5315), at 2. Thus, the judgment in this case turns on two important issues absent in *Branch*: whether a heightened pleading standard is permissible, and, if so, whether the direct evidence standard applied by the court of appeals is the proper standard.

"may also be 'more certain, satisfying and persuasive than direct evidence.'" *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 330 (1960) (quoting *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, 508 n.17 (1957)). Requiring "direct evidence," moreover, is particularly inappropriate where, as here, state of mind is at issue. As this Court has explained with respect to cases of fraud:

> [P]roof of scienter required in fraud cases is often a matter of inference from circumstantial evidence. If anything, the difficulty of proving the defendant's state of mind supports a lower standard of proof. In any event, we have noted elsewhere that circumstantial evidence can be more than sufficient.

Herman & MacLean v. Huddleston, 459 U.S. 375, 390 n.30 (1983).

In *Siegert*, the four justices who addressed the District of Columbia Circuit's direct evidence pleading rule flatly rejected it. Justice Kennedy wrote in concurrence that: "Upon the assertion of a qualified immunity defense the plaintiff must put forward specific, nonconclusory factual allegations which establish malice, or face dismissal. I would reject, however, the [D.C. Circuit] Court of Appeals' statement that a plaintiff must present direct, as opposed to circumstantial, evidence." 111 S. Ct. 1789, 1795. Similarly, Justice Marshall, joined by Justice Stevens and Justice Blackmun, perceived that the District of Columbia Circuit's direct evidence rule "effectively precludes any *Bivens* action in which the defendant's state of mind is an element of the underlying claim" and that there is "no warrant for such a rule as a matter of precedent or common sense." *Id.* at 1801 (Marshall, J., dissenting). (The majority did not reach this issue in *Siegert*.)

In a more recent concurring opinion, Justice Kennedy, joined by Justice Scalia, recognized that circumstantial evidence may overcome a claim of qualified immunity:

> [T]he question [of qualified immunity] may be resolved on summary judgment if the plaintiff cannot come forward with facts from which bad faith can be inferred. But the question is a factual one, and a plaintiff may rely on circumstantial rather than direct evidence to make his case.

Wyatt v. Cole, 112 S. Ct. 1827, 1837 (1992) (Kennedy, J., concurring).

The court below dismissed this action simply because the petitioner's compelling and persuasive evidence was circumstantial. The rule of decision in this case threatens to undermine this Court's decision in *Bivens* by effectively converting an official's qualified immunity into absolute immunity, thus precluding vindication of clearly established constitutional rights for reasons that are entirely irrelevant to the merits of a claim. That result is contrary to this Court's recognition that "an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). *See Bivens*, 403 U.S. at 410. The extreme standard of pleading and proof applied in this case is all the more unwarranted in light of the plain deprivation of valued First Amendment protections.[12]

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12 The issue takes on even greater urgency because motive is often an essential element of violations of the due process guarantees of the Fifth Amendment, equal protection guarantees of the Fourteenth Amendment and the prohibition against cruel and unusual punishment of the Eighth Amendment. *See, e.g., Farmer v. Brennan*, 62 U.S.L.W. 4446, 4448 (June 6, 1994) ("To violate the Cruel and Unusual Punishment Clause, a prison official must have a `sufficiently culpable state of mind,'" *quoting Wilson v. Seiter*, 501 U.S. 294, 297 (1991)); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 896 (1st Cir. 1988) (defendant's intent is an essential element of a claim of sexual harassment brought under the Fifth Amendment).

C. The Ruling Below Conflicts With Decisions of Two Other Circuits Holding That Heightened Pleading Standards Do Not Apply To *Bivens* And Section 1983 Cases That Turn On Motive

In *Leatherman*, this Court unanimously held that heightened pleading standards are impermissible in civil rights actions against municipalities. 113 S. Ct. at 1161-63. The Court explained that: "it is impossible to square the heightened pleading standard . . . with the liberal system of 'notice pleading' set up by the Federal Rules." *Id.* at 1163. The holding in *Leatherman* rests on the plain language of the Federal Rules, which does not create distinctions based on the subject matter of the case or the identity of the defendant.

Although the Court reserved the question of pleading standards for claims against individual officials (*id.* at 1162), the same Federal Rules that governed municipal liability in *Leatherman* apply with equal force to *Bivens* cases. As Justice Kennedy observed with respect to the District of Columbia Circuit's pleading rule in *Siegert*: "The heightened pleading standard is a departure from the usual pleading requirements of Federal Rules of Civil Procedure 8 and 9(b), and departs also from the normal standard for summary judgment under Rule 56." *Siegert*, 111 S. Ct. at 1795 (Kennedy, J., concurring).

In conflict with the decision below, two courts of appeals have relied on *Leatherman* in applying the notice pleading provisions of Rule 8 to civil rights actions alleging individual liability. The First Circuit recently cited *Leatherman* in assessing the adequacy of a Section 1983 complaint alleging that prison officials had fabricated disciplinary charges against a plaintiff inmate: "The standard for assessing the adequacy of a civil rights claim is whether, accepting the factual allegations in the complaint as true, and construing these facts in the light most favorable to the plaintiff, the pleading shows any fact which could entitle the plaintiff to relief." *Oropallo v. Parrish*, No. 93-1953, 1994 U.S. App. LEXIS 9748, at *8 (1st Cir. May 5, 1994). Similarly, the Seventh Circuit, in a Section 1983 action

against individual defendants alleging racial discrimination, held:

> Under the Supreme Court's recent holding in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 122 L.Ed. 2d 517, 113 S.Ct. 1160, 1163 (1993), however, a heightened pleading rule does not apply to § 1983 claims. Rather, Rule 8 of the Federal Rules of Civil Procedure is applicable.

Black v. Lane, No. 92-3627, 1994 U.S. App. LEXIS 8939, at *11-12 (7th Cir. Apr. 26, 1994). *See also Bombliss v. County of Lee*, No. 93-1220, 1994 U.S. App. LEXIS 6935, at *8-9 (7th Cir. Apr. 6, 1994) (citing *Leatherman* in Section 1983 action, alleging that defendants "conspired to maliciously prosecute [plaintiff]," for the proposition that "the federal notice pleading rule requires a complaint to include only 'a short and plain statement' of the claim showing that the pleader is entitled to relief").[13]

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[13] In addition, numerous district courts have concluded that the rationale of *Leatherman* precludes a heightened pleading standard in *Bivens* and Section 1983 actions against individual government officials. *See Tuite v. Henry*, No. 93 C 3248, 1994 U.S. Dist. LEXIS 1845, at *8-9 (N.D. Ill. Feb. 11, 1994) ("Just as the Federal Rules do not create an exception from Rule 8 for allegations of municipal civil rights liability, it seems consistent to conclude that they do not create such an exception for suits against individual government officials"); *McCallen v. Holland-Hull*, No. 93-3415, 1994 U.S. Dist. LEXIS 1364, at *3 (E.D. Pa. Jan. 27, 1994) ("the Court's analysis [in *Leatherman*], one of basic statutory construction, applies with equal force in § 1983 cases against individual defendants"); *Batiste v. Colonial Sugars, Inc.*, No. 92-3513, 1993 U.S. Dist. LEXIS 6038, at *5 (E.D. La. May 5, 1993) ("There is no logical reason to limit *Leatherman's* holding to claims for municipal liability, as the same Federal Rules of Civil Procedure govern all claims arising under § 1983); *Dodson v. City of Kenner*, No. 92-3530:E/6, 1993 U.S. Dist. LEXIS 6077, at *2 (E.D. La. May 5, 1993) ("Just as Chief Justice Rehnquist noted that Rule 9(b) makes no mention of municipal liability, this Court notes that the rule fails to mention claims against individual government officials"); *Mohid v. Wheatley*, No. 3:92-CV-2284-H, 1993 U.S. Dist. LEXIS 5285, at *8 (N.D. Tex. Apr. 20, 1993) ("Although the Supreme Court expressly refused to consider cases such as this one involving liability of an individual government official . . . its reasoning extends to the circumstances of this case" (citation omitted)); *Callaghan v. Congemi*, No. 91-1496, 1993 U.S. Dist LEXIS 4819, at *17 (E.D. La. Apr. 8, 1993) ("The Supreme Court's reasoning in *Leatherman* . . . appears to sound the death knell for [the] requirement of heightened pleading in suits involving individual government officials" (citation omitted)); *Sapp v. Cunningham*, No. 93-CV-0222-B 1994, U.S. Dist. LEXIS 3707, at *18 n.9 (D.Wyo. Mar. 23, 1994)

The court below, however, held that notwithstanding *Leatherman* it would continue to require *Bivens* and Section 1983 plaintiffs to satisfy its self-created "heightened pleading standard." As the majority wrote: "because the Court [in *Leatherman*] did not address heightened pleading in individual capacity suits, our precedent requiring that standard in such suits remains the governing law of this circuit." App., *infra*, 9a n.9. The Ninth Circuit, which had "[f]ollow[ed] the lead of the District of Columbia Circuit" in adopting a heightened pleading standard, has also held that *Leatherman* does not occasion a reassessment of circuit precedent because "the Court cordoned off the question whether a heightened pleading standard might be justified in an action against an individual officer." *Branch*, 14 F.3d at 452, 456. Review by this Court is necessary to resolve this split between the First and Seventh Circuits, on the one hand, and the Ninth and District of Columbia Circuits, on the other, concerning the permissibility of "heightened pleading standards" in *Bivens* and Section 1983 cases alleging individual liability.

D. Review Is Warranted To Resolve A Conflict Between Federal Courts Of Appeals And State Courts Of Last Resort

The decision below also conflicts with the holdings of the highest courts in several states on the question whether a heightened pleading standard is permissible in cases involving qualified immunity issues. Contrary to the decision below, the District of Columbia Court of Appeals recently observed that "the Supreme Court has thrown a cloud over the continued viability of [the heightened pleading standard] even as applied to the qualified immunity defense." *Fulwood v. Porter*, 639 A.2d 594, 597 (D.C. 1994). The disagreement between the District of Columbia Circuit and the District of Columbia Court of Appeals underscores the practical dilemma created by the decision below and emphatically reinforces the need for

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("*Leatherman* effectively overrules this aspect of *Sawyer v. County of Creek*, 908 F.2d 663, 665-67 (10th Cir. 1990), where the Tenth Circuit endorsed a heightened pleading requirement").

review. The constitutional rights of citizens and the immunities of government officials in the District of Columbia are subject to different standards depending upon the forum in which a lawsuit is filed.

The conflict is by no means limited to the District of Columbia. The highest courts in other states have applied a variety of standards for resolving claims of qualified immunity that conflict with the decision below. *See Lubcke v. Boise City/Ada County Hous. Auth.*, 860 P.2d 653, 667 (Idaho 1993) (holding that the presence of material issues of fact "preclude[s] the court from ruling on the qualified immunity question" and that such a material issue would be present in "cases where clearly settled constitutional rights were violated if the plaintiff's testimony is believed but were not if the defendant's testimony is believed"); *Point Properties, Inc. v. Anderson*, 584 So.2d 1332, 1340 (Ala. 1991) (holding that evidence that city council members "were motivated" by improper goals must be viewed "in the light most favorable to [the Section 1983 plaintiff]"). These decisions of highest state courts demonstrate the clear national scope of a conflict that requires this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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June 22, 1994